Ng Chang Seng v Technip Geoproduction (M) Sdn Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-692–04 OF 2019
HANIPAH FARIKULLAH, LEE SWEE SENG AND CHE MOHD RUZIMA JJCA
23 OCTOBER 2020

Labour Law — Employment — Dismissal — Retrenchment of claimant — Claimant argued retrenchment exercise was mala fide — Industrial Court found favour with claimant — High Court quashed award of Industrial Court — Whether company proved claimant became redundant in company — Whether company followed last-in first-out principle or valid reasons to depart from it in retrenchment — Whether company preferred to retain foreign workmen in preference to local workmen in retrenchment — Whether company preferred to retain contract workmen in preference to permanent workmen in retrenchment — Whether company's retrenchment exercise where claimant was selected for retrenchment was done in bad faith

This was a case where after having served the company for some 13 years an employee ('claimant') was chosen, very unfortunately, for retrenchment, as part of the company's worldwide policy of restructuring by downsizing. The nub of the complaint was that the procedure of last-in first-out ('LIFO') had not been followed and that there was no cogent reason not to follow it. Likewise, the claimant argued, retrenchment should start with the foreign contract employees first before Malaysians, all things being more or less equal. He argued that the retrenchment exercise was mala fide and that it was a cloak to conceal what in effect was the company's perception that his performance was poor or that he had a bad attitude as he had objected to an earlier proposed transfer to another project where he would be reporting to one who was previously his subordinate whose performance he had given his performance appraisal as his superior. The Industrial Court heard the dispute between the parties and handed down its award. His argument found favour with the Industrial Court. It held in its award that the termination had been without just cause or excuse as the retrenchment exercise was not done bona fide but rather a way for the company getting rid of an employee that they perceived had performed poorly without a proper right to be heard and that the whole exercise was colourable with that collateral purpose. On appeal, the High Court on a judicial review application quashed the award of the Industrial Court on the ground that the retrenchment exercise was genuine and was part of the company's prerogative to restrategise in the wake of the slowdown in business in the oil and gas sector in line with the deteriorating oil prices then.

The high court was satisfied that the claimant had unreasonably rejected the offer to work at another project of the company on account of having to report to a subordinate and that in any event the foreign and contract staff retained over the claimant had special skills sets not possessed by the claimant. Hence the appeal by the claimant to this court. The issues for consideration were (a) whether the company had proved that the claimant had became redundant in the company in the retrenchment; (b) whether the company had followed the LIFO principle or had valid reasons to depart from it in the retrenchment; (c) whether the company had preferred to retain foreign workmen in preference to local workmen in the retrenchment; (d) whether the company had preferred to retain contract workmen in preference to permanent workmen in the retrenchment; and (e) whether the company's retrenchment exercise where the claimant was selected for retrenchment was done in bad faith.

Held, allowing the appeal, setting aside the decision of the High Court and affirming the award of the Industrial Court:

(1) The company could not prejudge the previous action of the claimant in objecting to the reporting to his subordinate as governing his future action in that he would not be reporting for duty when the time comes for his posting there to the Refinery and Petrochemical Integrated Development ('RAPID') Project. Neither should the company resurrect the claimant's previous objection to reporting to his subordinate after some five months had passed as indicative of his present position to any transfer to the RAPID Project when that had been overtaken by the event of the company instructing him to remain back at the SK316 Project to solve a slippage problem. The company had not discharged its burden to prove that the claimant had been rightly selected to be retrenched as compared to the 11 foreign workers and five locals holding a similar position and presumably skill sets and competencies as the claimant. To justify the termination on ground of redundancy the comparison to be made was not so much to the staff that had been retrenched but to those being retained in preference to the claimant and to see if the company had justified that in showing the retrenchment of the claimant was reasonable in the circumstances of the case. The burden of proof was always on the company to show before the Industrial Court that the termination on ground of retrenchment arising out of redundancy was for a just cause or excuse and that it was lawful and not actuated by irrelevant considerations like poor performance or perceived insubordination or that it was not done mala fide and did not reek of unfair labour practice. The Industrial Court had taken into consideration the relevant factor of whether the claimant's position had been rendered redundant and had not taken into consideration the irrelevant factor of a

previous objection raised by the claimant on his reporting to his subordinate (see paras 54, 57–58, 63 & 65).

(2) The company had not led any evidence to show that the 11 foreign workers and five local workers holding similar position like the claimant when the claimant was terminated had longer terms of service with the company. No cogent evidence had been presented before the Industrial Court for it to believe the company other than a mere 'say so' which fell short of discharging the burden of proof. It was only fair that a worker who had spent more than ten years in that particular field of instrument design could be considered an expert in that particular field and if the foreign workers retained had special skills not possessed by the claimant then the company must lead evidence on that (see paras 67, 69 & 71).

(3) To retain foreign workers and to terminate local ones and then re-employ them through an agency did not engender confidence that the retrenchment exercise had been done bona fide. The Industrial Court could not be faulted in finding that in the retrenchment exercise the company had targeted locals for retrenchment whilst the foreign workers still get to keep their jobs. There was no cogent reason to disturb the finding of fact of the Industrial Court that the local workers like the claimant had been selected for retrenchment in preference to the foreign workers and there was no evidence that those foreign workers in the same team had skills not possessed by the claimant as a senior designer (see paras 79 & 82).

(4) The company had not led evidence to show that the contract staff retained in preference to the permanent staff had special skills not possessed by the claimant. In fact, the permanent staff that were terminated were in some cases re-employed back on a contract basis. It could not be said that the chairman had no basis to come to the conclusion that she did as the burden was on the company to show that the foreign workers had some special skills not possessed by the claimant and that as for the local employees, they had been there longer than the claimant and even if they had not, they had some special skills not possessed by the claimant (see paras 85 & 87).

(5) While not a word was mentioned on the perceived incompetency and poor performance of the claimant in the letter of termination, yet what had percolated to the surface in the crucible of cross-examination of COW1 and COW2 was that the selection for retrenchment of the claimant was based on performance or rather his poor performance. There was no evidence led that the claimant had been served with a warning letter to improve on his performance or that his previous performance appraisal had revealed something alarming about his poor performance. It would be unfair to select an employee for retrenchment based on a perceived poor performance when he had not been given an

opportunity to be heard on his poor performance and more so when he had achieved his merit bonus for the past 3–5 years and successfully solved the slippage problem at the SK 316 Project for a handing over to Petronas. The Industrial Court could not be said to have come to a decision that was so manifestly unreasonable that no reasonable tribunal, similarly circumstanced, would have arrived at which the Industrial Court had. There was no illegality in the finding of the Industrial Court nor could the award be said to be irrational in all the circumstances if the case. There had been a proper appreciation of the facts and the law by the Industrial Court and this was certainly not a case where the decision of the Industrial Court could be said to be devoid of or in defiance of logic and accepted moral standard that would justify the intervention of a review court (see paras 98, 100, 102–103 & 106).

[Bahasa Malaysia summary

Ini adalah kes di mana setelah berkhidmat dengan syarikat selama 13 tahun, seorang pekerja ('penuntut') dipilih, malangnya, untuk pemberhentian kerja, sebagai sebahagian daripada dasar penyusunan semula syarikat di seluruh dunia dengan pengurangan. Dasar aduan tersebut adalah bahawa prosedur *last-in first-out* ('LIFO') tidak diikuti dan tidak ada alasan yang meyakinkan untuk tidak mengikutinya. Demikian juga, penuntut berpendapat, pemberhentian pekerja harus bermula dengan pekerja asing kontrak terlebih dahulu sebelum rakyat Malaysia, semua perkara lebih kurang sama. Dia berpendapat bahawa pemberhentian kerja adalah mala fide dan bahawa adalah untuk menyembunyikan apa yang berlaku adalah persepsi syarikat bahawa prestasinya buruk atau bahawa dia mempunyai sikap buruk kerana dia membantah cadangan awal pemindahan ke projek lain di mana dia akan melaporkan kepada seseorang yang sebelumnya adalah bawahannya yang prestasinya dia telah berikan penilaian prestasi sebagai atasannya. Mahkamah Perusahaan mendengar pertikaian antara pihak-pihak dan memberikan award. Hujahannya mendapat sokongan Mahkamah Perusahaan. Diputuskan dalam awardnya, pemberhentian itu dilakukan tanpa sebab atau alasan adil kerana pelaksanaan pemberhentian kerja tidak dilakukan secara bona fide tetapi cara bagi syarikat untuk menyingkirkan pekerja yang mereka anggap telah menunjukkan prestasi yang buruk tanpa hak yang betul untuk didengar dan bahawa keseluruhan pelaksanaan itu ditunjukkan dengan tujuan cagaran tersebut. Atas rayuan, Mahkamah Tinggi atas permohonan semakan kehakiman membatalkan award Mahkamah Perusahaan dengan alasan bahawa pemberhentian kerja itu betul dan merupakan sebahagian daripada hak syarikat untuk menyusun semula strategi berikutan kemerosotan perniagaan sektor minyak dan gas sejajar dengan penurunan harga minyak ketika itu. Mahkamah Tinggi berpuas hati bahawa penuntut telah menolak tawaran untuk bekerja di projek syarikat lain secara tidak munasabah kerana terpaksa melapor kepada pekerja bawahan dan bahawa dalam keadaan apa pun, kakitangan asing dan kontrak yang dikekalkan terhadap penuntut mempunyai

A set kemahiran khas yang tidak dimiliki oleh penuntut. Oleh itu rayuan oleh penuntut ke mahkamah ini. Isu-isu untuk pertimbangan adalah: (a) sama ada syarikat telah membuktikan bahawa penuntut telah menjadi pekerja lebihan dalam pemberhentian pekerja; (b) sama ada syarikat telah mengikuti prinsip LIFO atau mempunyai alasan yang sah untuk menyimpang daripadanya B dalam pemberhentian kerja; (c) sama ada syarikat mengutamakan untuk mengekalkan pekerja asing berbanding pekerja tempatan dalam pemberhentian pekerja; (d) sama ada syarikat mengutamakan untuk mengekalkan pekerja kontrak berbanding pekerja tetap dalam pemberhentian pekerja; dan (e) sama ada pelaksanaan pemberhentian syarikat di mana C penuntut dipilih untuk diberhentikan dilakukan dengan niat buruk.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan mengesahkan award Mahkamah Perusahaan:

D (1) Syarikat tidak boleh menghukum terlebih dahulu tindakan sebelumnya dari penuntut dalam membantah untuk melaporkan kepada bawahannya sebagai mengatur tindakannya di masa depan kerana dia tidak akan melaporkan tugas ketika tiba waktunya untuk tugasannya di Projek Refinery and Petrochemical Integrated Development ('RAPID'). E Syarikat juga tidak harus membangkitkan kembali bantahan awal penuntut untuk melaporkan kepada bawahannya setelah sekitar lima bulan berlalu sebagai petunjuk kedudukannya sekarang untuk sebarang pemindahan ke Projek RAPID apabila ia telah ditimpa peristiwa syarikat yang mengarahkannya untuk tetap kekal Projek SK316 untuk F menyelesaikan masalah gelinciran. Syarikat tidak melepaskan bebannya untuk membuktikan bahawa penuntut telah dipilih dengan betul untuk diberhentikan berbanding dengan 11 pekerja asing dan lima orang tempatan yang memegang jawatan yang sama dan kemungkinan set kemahiran dan kecekapan seperti penuntut. Untuk menjustifikasikan G pemberhentian dengan alasan pekerja lebihan, perbandingan yang harus dibuat bukan dengan ramai kakitangan yang diberhentikan tetapi untuk mereka yang dikekalkan lebih diutamakan daripada penuntut dan untuk melihat jika syarikat itu telah berpatutan bahawa dalam menunjukkan pemberhentian penuntut adalah wajar dalam keadaan kes tersebut. H Beban pembuktian selalu pada syarikat untuk menunjukkan di hadapan Mahkamah Perusahaan bahawa pemberhentian dengan alasan pemberhentian kerja yang disebabkan oleh pekerja lebihan adalah sebab atau alasan yang adil dan bahawa ia sah dan tidak didorong oleh pertimbangan yang tidak relevan seperti prestasi buruk atau anggapan I keingkaran atau bahawa ia tidak dilakukan mala fide dan tidak berbau amalan buruh yang tidak adil. Mahkamah Perusahaan telah mempertimbangkan faktor yang relevan sama ada kedudukan penuntut telah menjadi berlebihan dan tidak mempertimbangkan faktor yang tidak relevan dari bantahan sebelumnya yang ditimbulkan oleh penuntut

mengenai pelaporannya kepada bawahannya (lihat perenggan 54, 57–58, 63 & 65). A

(2) Syarikat tidak mengemukakan keterangan yang menunjukkan bahawa 11 pekerja asing dan lima pekerja tempatan yang memegang jawatan serupa seperti penuntut ketika penuntut diberhentikan mempunyai jangka masa perkhidmatan yang lebih lama dengan syarikat tersebut. Tidak ada keterangan yang meyakinkan yang telah dikemukakan di Mahkamah Perusahaan untuk mempercayai syarikat selain semata-mata 'mengatakan begitu' yang gagal melepaskan beban pembuktian. Adalah wajar bahawa seorang pekerja yang telah menghabiskan lebih dari sepuluh tahun dalam bidang reka bentuk instrumen tertentu dapat dianggap sebagai pakar dalam bidang tersebut dan jika pekerja asing yang dikekalkan mempunyai kemahiran khas yang tidak dimiliki oleh penuntut, maka syarikat tersebut harus mengemukakan keterangan mengenai perkara itu (lihat perenggan 67, 69 & 71). B C D

(3) Untuk mengekalkan pekerja asing dan memberhentikan pekerja tempatan dan kemudian memperkerjakan semula mereka melalui agensi tidak menimbulkan keyakinan bahawa pelaksanaan pemberhentian kerja telah dilakukan secara bona fide. Mahkamah Perindustrian tidak dapat disalahkan dalam menemukan bahawa dalam pelaksanaan pemberhentian kerja syarikat telah mensasarkan pemberhentian pekerja tempatan sementara pekerja asing masih dapat mempertahankan pekerjaan mereka. Tidak ada alasan yang meyakinkan untuk mengganggu penemuan fakta Mahkamah Perusahaan bahawa pekerja tempatan seperti penuntut telah dipilih untuk diberhentikan berbanding pekerja asing dan tidak ada bukti bahawa pekerja asing dalam pasukan yang sama mempunyai kemahiran yang tidak dimiliki oleh penuntut sebagai pereka kanan (lihat perenggan 79 & 82). E F

(4) Syarikat tidak mengemukakan keterangan untuk menunjukkan bahawa kakitangan kontrak yang dikekalkan lebih diutamakan berbanding kakitangan tetap mempunyai kemahiran khas yang tidak dimiliki oleh penuntut. Malah, kakitangan tetap yang diberhentikan dalam beberapa kes diperkerjakan semula secara kontrak. Tidak dapat dikatakan bahawa pengerusi tidak memiliki dasar untuk sampai pada kesimpulan yang beliau lakukan kerana beban adalah pada syarikat untuk menunjukkan bahawa pekerja asing mempunyai beberapa kemahiran khas yang tidak dimiliki oleh penuntut dan bahawa bagi pekerja tempatan, mereka telah berada di sana lebih lama daripada penuntut dan jiika tidak, mereka mempunyai beberapa kemahiran khas yang tidak dimiliki oleh penuntut (lihat perenggan 85 & 87). G H I

(5) Walaupun tidak ada sepatah kata pun yang disebut mengenai ketidakcekapan dan prestasi buruk penuntut dalam surat penamatan, namun apa yang telah meresap ke permukaan dalam pemeriksaan balas

COW1 dan COW2 adalah pemilihan untuk pemberhentian penuntut berdasarkan prestasi atau prestasi yang kurang baik. Tidak ada keterangan yang menunjukkan bahawa penuntut telah diserahkan dengan surat peringatan untuk meningkatkan prestasinya atau bahawa penilaian prestasi sebelumnya telah menunjukkan sesuatu yang membimbangkan tentang prestasinya yang buruk. Adalah tidak adil untuk memilih pekerja untuk diberhentikan berdasarkan prestasi buruk yang dirasakan ketika dia tidak diberi kesempatan untuk didengar mengenai prestasi buruknya dan lebih-lebih lagi ketika dia telah memperoleh bonus prestasi selama 3–5 tahun yang lalu dan berjaya menyelesaikan masalah gelinciran di Projek SK316 untuk diserahkan kepada Petronas. Mahkamah Perindustrian tidak dapat dikatakan telah mengambil keputusan yang secara jelas tidak masuk akal sehingga tidak ada tribunal yang wajar yang akan tiba seperti Mahkamah Industri. Tidak ada pelanggaran undang-undang dalam penemuan Mahkamah Perusahaan dan award itu tidak boleh dikatakan tidak rasional dalam semua keadaan kes. Telah ada penghargaan yang betul terhadap fakta dan undang-undang oleh Mahkamah Perusahaan dan ini tentunya bukan merupakan kes di mana keputusan Mahkamah Perusahaan boleh dikatakan tidak mempunyai atau bertentangan dengan logik dan menerima standard moral yang akan membenarkan campur tangan mahkamah semakan (lihat perenggan 98, 100, 102–103 & 106).)]

Cases referred to

American Malaysian Life Assurance Sdn Bhd v Sivanasan Kanagasabai [1997] 3 ILR 242, IC (refd)

Bayer (M) Sdn Bhd v Ng Hong Pau [1999] 4 MLJ 361, CA (refd)

Council of Civil Service Unions And Others v Minister for the Civil Service [1985] AC 374, HL (refd)

East Asiatic Company (M) Bhd v Valen Noel Yap [1987] 1 ILR 363, IC (refd)

Equant Integration Services Sdn Bhd (in liquidation) v Wong Wai Hung & Anor [2012] MLJU 582; [2012] 1 LNS 1296, HC (refd)

Lilly Industries (M) Sdn Bhd v Billy Wayne Selsor [2006] 3 ILR 1507, IC (folld)

Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 5 MLJ 113; [2006] 3 CLJ 837, FC (refd)

Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409, FC (refd)

Penang & S Prai Textile & Garment Industry Employees' Union v Dragon & Phoenix Bhd Penang & Anor [1989] 1 MLJ 481; [1989] 2 CLJ Rep 239, HC (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)
Senjuang Sdn Bhd v Munsiah Mad Nor [2015] 1 ILR 471, IC (refd)
William Jacks & Co (M) Sdn Bhd v S Balasingam [2000] 7 MLJ 1; [1997] 3 CLJ 235, CA (refd)

Legislation referred to

Industrial Relations Act 1967 ss 20(1), 30(5A)

Appeal from: Judicial Review No WA-25–212–08 of 2018 (High Court, Kuala Lumpur)

Anthony Gomez (Gomez & Assoc) for the appellant.
Poh Kuang Horng and Siva Subramaniam (T Siva & Co) for the respondent.

Lee Swee Seng J (delivering judgment of the court):

[1] This is a case where after having served the company for some 13 years an employee was chosen, very unfortunately, for retrenchment, as part of the company's worldwide policy of restructuring by downsizing as investments from clients on oil exploration had slowed down in tandem with the falling oil price then in the second half of 2015. To be fair to the company, many others in the company in Malaysia were also selected for retrenchment.

[2] However the nub of the complaint was that the procedure of last-in first-out ('LIFO') had not been followed and that there was no cogent reason not to follow it. Likewise, the employee argued, retrenchment should start with the foreign contract employees first before Malaysians, all things being more or less equal. He argued that the retrenchment exercise was mala fide and that it was a cloak to conceal what in effect was the company's perception that his performance was poor or that he had a bad attitude as he had objected to an earlier proposed transfer to another project where he would be reporting to one who was previously his subordinate whose performance he had given his performance appraisal as his superior.

[3] His reference to the Industrial Court ('IC') was registered as Industrial Court Case No 3/4–562/16. The IC heard the dispute between the parties and on 30 May 2018 handed down its award in Award No 1211 of 2018.

[4] His argument found favour with the Industrial Court. It held in its award that the termination had been without just cause or excuse as the retrenchment exercise was not done bona fide but rather a way for the company getting rid of an employee that they perceived had performed poorly without a proper right

to be heard and that the whole exercise was colourable with that collateral purpose.

[5] On appeal, the High Court on a judicial review application quashed the award of the Industrial Court on 26 March 2019 on the ground that the retrenchment exercise was genuine and was part of the company's prerogative to restrategise in the wake of the slowdown in business in the oil and gas sector in line with the deteriorating oil prices then.

[6] The High Court was satisfied that the claimant had unreasonably rejected the offer to work at another project of the company on account of having to report to a subordinate and that in any event the foreign and contract staff retained over the claimant had special skills sets not possessed by the claimant.

[7] Hence the appeal by the employee to this court. The parties shall be referred to as the claimant and the company and where necessary as the appellant and respondent correspondingly.

PRINCIPLES

Principles applicable in retrenchment

[8] It is an accepted principle of industrial jurisprudence that a company is at liberty to reorganise its workforce and more so when there is a downturn in its business. It is part of managerial prerogative to downsize or right size, to outsource or to resort to term contract for work that is uncertain.

[9] An excess of staff force could be the result of a slowdown in business or the closing down of some businesses because of off-shoring or outsourcing, or the introduction of computerisation and the use of artificial intelligence ('AI') and robotics or the investing in and leveraging of information technology ('IT') to reduce workers.

[10] In *East Asiatic Company (M) Bhd v Valen Noel Yap* [1987] 1 ILR 363, the Industrial Court noted that it is the right and privilege of every employer to reorganise his business in any manner he thinks fit for the purpose of economy or even convenience; and if by implementing a restructuring scheme for genuine reasons, there are excess employees to be discharged then the employer may proceed to do so.

[11] Again, in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235 it was stated that 'so long as that managerial power

is exercised bona fide, the decision is immune from examination even by the Industrial Court'. A

[12] However, in doing so, it must comply with certain established principles in retrenchment in showing that there is redundancy and that the LIFO principle has been followed. In cases where there is a mixed local and foreign workman there is the further principle that all things being equal the foreign workman would be selected for retrenchment as opposed to a local. Likewise, where there are contract staff as opposed to permanent staff then any retrenchment would have to start with the contract staff first. B C

[13] Thus a retrenchment cannot be capricious or for a colourable and collateral purpose of getting rid of a workman that the company perceived to be difficult or uncooperative or has an attitude problem.

[14] Neither can it be used as a method to get rid of 'dead wood' or staff deemed to have performed poorly or those who are deemed no longer in sync with the ethos of the company. D

[15] Nor does this right entitle an employer under the guise of reorganisation and corporate restructuring to rid the company of employees who have offended the boss in some way or to promote the interest of some employees to the detriment of others in discriminating against the less favourable. E

[16] The code of conduct for industrial harmony ('code of conduct') sets out the guiding principles to follow in the case of retrenchment. The ethos and exhortations are laudable and that all employers are enjoined to embrace it such that a wanton disregard of it may be indicative of a lack of bona fide and an unfair labour practice in the employer's retrenchment exercise. F G

[17] The code of conduct has been given its legal 'teeth' by virtue of s 30(5A) of the Industrial Relations Act 1967 where the Industrial Court in making its award may take into consideration the provisions in the code of conduct.

[18] The relevant clauses in the code of conduct with respect to retrenchment read as follows: H

> Redundancy and retrenchment
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> (20) In circumstances where redundancy is likely an employer should, in consultation with his employees' representatives or their trade union, as appropriate, and in consultation with the Ministry of Labour and Manpower, take positive steps to avert or minimise reductions of workforce by the adoption of appropriate measures such as: I
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> (a) limitation on recruitment;

(b) restriction of overtime work;

(c) restriction of work on weekly day of rest;

(d) reduction in number of shifts or days worked a week;

(e) reduction in the number of hours of work; and

(f) re-training and/or transfer to other department/work.

(21) The ultimate responsibility for deciding on the size of the workforce must rest with the employer, but before any decision on reduction is taken, there should be consultation with the workers or their trade union representatives on the reduction.

(22) (a) If retrenchment becomes necessary, despite having taken appropriate measures, the employer should take the following measures:

(a) Giving as early a warning, as practicable, to the workers concerned;

(b) Introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;

(c) Retiring workers who are beyond their normal retiring age;

(d) Assisting, in co-operation with the Ministry of Human Resources, the workers to find work outside the undertaking;

(e) Spreading termination of employment over a longer period; and

(f) Ensuring that no such announcement is made before the workers and their representatives or trade union has been informed.

(b) *The employer should select employees to be retrenched in accordance with objective criteria.* Such criteria, which should have been worked out in advance with the employees' representatives or trade union may include:

(a) The need for the efficient operation of the establishment or undertaking;

(b) *Ability, experience, skill and occupational qualifications of individual workers required by the establishment or undertaking under part (i)*;

(c) *Consideration for length of service and status (non-citizens, casual, temporary, permanent)*;

(d) Age;

(e) Family situation; and

(f) Such other criteria as may be formulated in the context of national policies.

(23) Employees, who are retrenched, should be given priority of engagement/re-engagement, as far as is possible, by the employer when he engages workers.

(24) The appropriate measures and objective criteria should comprise part of the establishments or undertaking's employment policy. (Emphasis added.)

[19] Each time a workman is retrenched and he perceives it as an unlawful termination, he is entitled to make a reference under s 20(1) of the Industrial Relations Act 1967 and should the matter proceed further to the Industrial Court then the burden is on the employer to show that the retrenchment has been done bona fide following established principles and practices with the result that the termination of the employee has been for just cause and excuse.

Principles applicable in judicial review

[20] Learned counsel for the company argued that it was perfectly proper for the High Court in hearing the matter on judicial review to consider the merits of the case as was held by the Federal Court in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1:

> (15) ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. Rama Chandran is the mother of all those cases. The Federal in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
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> (19) Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matter into consideration, such findings are always amendable to judicial review.

[21] The palpable paradigm shift from focusing on the process of decision making of a tribunal or the manner of arriving at a decision to scrutinising the substance of the decision or the merits of a decision started with the Federal Court's case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147.

[22] Whilst some cases may seem to suggest that the High Court may now be more prepared to quash a decision of a tribunal on merits, this is not to say that the distinction between a review and an appeal has now been so diffused that where merits of a review of an inferior tribunal's decision is concerned there is now no difference between an appeal and a review.

[23] It is said that a decision of an inferior tribunal may be quashed if the tribunal has failed to take into consideration relevant factors or that it took into consideration irrelevant factors or that it has misinterpreted the law or the

relevant contract between the parties or that the decision arrived at is not supported by the facts or that it is so outrageous in its defiance of logic or of accepted moral standards that no reasonable tribunal with a proper appreciation of the facts as presented could have arrived at. See the Federal Court case of *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409.

[24] Be that as it may any review of facts must necessarily be that of a low intensity review and unless its findings are not unreasonable or that it is not evidently or evidentially irrational or perverse, the findings of fact of such a tribunal should not be disturbed.

[25] A higher and far more rigorous intensity of the court's review of administrative action may be justified in cases of interference with human rights and in cases where the impugned decision may put life and liberty at *Rama Chandran*risk. See at p 190 d-e MLJ.

[26] The grounds for quashing a decision of a tribunal for illegality and irrationality may afford the review court more room to descend into the merits of the decision but where the findings of fact are concerned the review court would defer to the tribunal's findings unless it is totally unsupportable from the evidence adduced and lacking in probity such as to produce an irrational decision.

[27] In *Rama Chandran*'s case the Federal Court itself placed some restraint on the more liberal approach to interfere with factual findings and consequently to mould the remedy to suit the justice of the case as follows at p 197 MLJ; pp 183–184 CLJ:

> Needless to say, if, as appears to be the case, that this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict *regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.*
>
> For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of power on the part of the courts. (Emphasis added.)

[28] In fact for a judicial review on grounds of 'illegality' and 'irrationality' the High Court in exercising its review jurisdiction must first be satisfied that there is 'illegality' or 'irrationality' as explained Lord Diplock in *Council of Civil*

Service Unions And Others v Minister for the Civil Service [1985] AC 374 as follows:

> By '*illegality*' as a ground for judicial review I mean that *the decision maker must understand directly the law that regulates his decision-making power and must give effect to it.* Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the Judges, by whom the judicial power of the state is exercisable. By '*irrationality*' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is *so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.* Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the Courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review. (Emphasis added.)

[29] Even in in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* the scope and ambit of *Rama Chandran* was clarified and explained as follows:

> [17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625 again held that the reviewing court may scrutinise a decision on its merits *but only in the most appropriate of cases and not every case is amenable to the Rama Chandran approach.* Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
>
> [18] The court of appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasinga* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union of Plantation Workers v Kumpulan Jerai Sdn Bhd (Rengam)* [2000] 2 MLJ 144; [2000] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong & Another* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:
>
> (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or
>
> (b) there is no evidence to support the conclusion reached. (See *Swedish Motor Assemblies Sdn Bhd v Hj Md Ison Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[30] In *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288

at pp 295–296 ; [2003] 4 CLJ 625 at p 635, the Federal Court in affirming the award of the Industrial Court in favour of the company which employee had alleged constructive dismissal and thus setting aside both the High Court and the court of appeal decisions issued this cautionary note as follows:

> Clearly therefore, not every case is amenable to the *Rama Chandran* approach. It depends on the factual matrix and/or the legal modalities of the case. This is certainly a matter of judicial discretion on the part of the reviewing judge. ...
>
> ... There is still the question of whether the High Court had properly examined and appreciated the facts presented in the Industrial Court. *Could it be said, as the Court of Appeal had held, that no reasonable tribunal, similarly circumstanced, would have arrived at the decision which the Industrial Court had?* At this point, I find the following observation expressed by Sudha CKG. Pillay in her article *The Ruling in Rama Chandran — A Quantum Leap in Administrative Law* [1998] 3 MLJ lxii to be particularly apt. She said this:
>
> > The new powers that have been entrusted to the courts are enormous and like any other powers are open to abuse. Thus, it is vital for the reviewing courts to display caution and circumspection in the exercise of these wider powers. To this end, the courts should not be quick to wield their new powers in each and every case that comes before it. It has to weigh a multitude of factors before coming to a decision to exercise such powers. In so far as the review of Industrial Court awards are concerned, the reviewing courts must balance not only the competing interest of both the employee and the employer but also the need to preserve the functions of the Industrial Court and to prevent the remedy of s 33A from fading into oblivion and becoming obsolete. If the ruling in *Rama Chandran* is taken to authorize the exercise of the wider powers of the courts in each and every case where the award of the Industrial Court is challenged, the spirit in which these new powers was conferred by the majority in *Rama Chandran* will have been misunderstood and, perhaps, inadvertently, pave the way for an unnecessary emasculation of the functions of the Industrial Court.
>
> The fear of unnecessarily emasculating the functions of the Industrial Court can be laid to rest if *the reviewing courts, in the exercise of their powers, constantly bear in mind that the review of the Industrial Court's award on the merits is akin to, though not the same as, the exercise of appellate powers. The courts should also remind themselves that the Industrial Court operates under the Industrial Relations Act 1967, in accordance with principles quite different from those in the civil courts.* For example, s 30(4) and (5) of the Act stipulates:
>
> > (4) In making its award in respect of trade dispute, the court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries;
> >
> > (5) The court shall act according to equity, good conscience and the substantial merits of the case without regard to the technicalities and legal form.

[31] Therefore while the distinction between a review and an appeal may now be blurred it is not banished altogether where the challenge on an inferior Tribunal's decision is based on illegality, irrationality and procedural impropriety or even proportionality.

[32] Whilst a review may be akin to an appeal, it is not to be equated with an appeal and the dividing line between a review and an appeal is distinctly different. A review may come close to resemble an appeal only when the decision of the tribunal cannot be justified at all, infected as it is with illegality, irrationality, procedural impropriety or proportionality. Otherwise the court in exercising its review jurisdiction which is of a supervisory nature would defer to finding of facts of the tribunal.

WHETHER THE COMPANY HAD PROVED THAT THE CLAIMANT HAD BECOME REDUNDANT IN THE COMPANY IN THE RETRENCHMENT

[33] The claimant had been working for the company for some 13 years before his contract of employment was terminated on account of redundancy. He commenced employment with the company on 1 July 2002 as its senior designer and his last drawn salary was RM19,400 as a senior instrument designer. His job included coordinating and verifying design works and leading teams of designers and draft persons. The instrument department is responsible for the monitoring and control of projects and plants by using various types of instruments such as transmitters, control valves and gauges.

[34] The company is a subsidiary of a multinational company known as TechnipFMC Plc based in London. Its core business is that of providing project management and engineering and consultancy services for on shore refinery plants and offshore oil and gas processing facilities for the energy industry such as Petronas and Shell in Malaysia.

[35] On 29 September 2015 he received the letter of termination of his employment with the cryptic note that his last day of employment with the company was on 30 September 2015 and that this was part of the company's worldwide retrenchment exercise owing to shrinkage of business leading to a redundancy of the claimant's position. The relevant parts of the crisp and carefully crafted letter of termination elegantly explained to necessity of the retrenchment because of redundancy in the following terms:

> ORGAINIZATIONAL RIGHTSIZING
>
> As you are aware following our announcements in July and August, due to capital expenditure cutbacks by operators and rescheduling of investments caused by the downturn in the oil and gas market, the industry is going through a trough in the

market cycle and Technip has no choice but to review its operations globally because there is now insufficient reservoir of opportunities to sustain a feasible workload.

We have already attempted several measure to mitigate the current business situation ... However, despite our efforts, we have reached the pour where our columns can no longer support the current operating cost.

We regret to inform you that your position as Senior Instrument Designer in Instrument Department had become redundant to the business requirements if Technip Geoproduction (M) Sdn Bhd ('Company').

[36] The termination letter also set forth the retrenchment benefits as well as the three month's salary in lieu of the notice of termination. He initially rejected the letter of termination and the payment of the retrenchment benefits but returned the next day to accept the payment with a clear note written in the letter of acceptance of the retrenchment benefits that it was done without prejudice to his right to challenge the legality of the termination on account of retrenchment.

[37] It must be appreciated that the claimant was specifically directed to complete an off-shore project called SK316 Project off the coast of Bintulu as there were slippages in the works which work he had been the team leader before he went on a two-month medical leave because of a prostate problem. His subordinate at that time was a foreign contract worker Rian Andrian who stepped in to lead the work during the claimant's medical leave. The claimant came back from his medical leave in May 2015 and continued until his employment was terminated.

[38] Apparently the slippage occurred when he was on medical leave and though the SK316 Project was at its tail end his expertise and skill was needed to attend to the slippage until the handing over of the project to Petronas. Whilst the works in SK316 Project were coming to an end, it did not mean that there was no work that the claimant could not be redeployed to.

[39] In fact initially the company had sounded out to the claimant at the beginning of 2015 that as the works in SK316 Project were coming to an end, he would be assigned to a project called Refinery and Petrochemical Integrated Development Project ('RAPID'). He discovered from the organisation chart that he would be reporting to Rian Andrian. His knee-jerk reaction was that that would be a demotion because Rian Andrian was his subordinate and that when the latter first joined the company, the claimant had been the one doing a performance review on the said Rian Andrian for his management.

[40] COW1, Mr Christopher Vincent who is the head of the instrument department and the claimant's superior admitted under cross-examination that Rian was the claimant's assistant in the SK316 Project. The claimant's

objection was not to the transfer but to the reporting structure that the company had put in place and this was duly made known to his boss.

[41] However, the assignment to RAPID did not materialise and indeed was overtaken by events as the company was confronted with a slippage in SK316 Project while he was on medical leave and while Rian Andrian was leading the team. While Rian was thereafter assigned to the RAPID Project in May 2015, the claimant had to remain in SK316 Project to sort out the slippage so that the project may be handed over to the client, Petronas.

[42] The claimant solved the problem with the slippage. However, come September 2015 the company was of the view that his presence there was no longer necessary and his work was handed over to another junior colleague, a foreign contract worker Randy.

[43] The claimant was thus looking forward to his reassignment to RAPID when he received the termination letter. The company had not shown that his job had been rendered redundant as a senior designer. His name had earlier been approved by Petronas to be part of the team assigned to the RAPID Project.

[44] The evidence as found by the Industrial Court was that staff who had been terminated were later employed back on a contract basis and the company was still continuing to recruit more foreign workers on a contract basis.

[45] Whilst economically that may be more viable at a time when the future is as usual uncertain, the proper way of right-sizing is not to terminate the permanent workmen no matter how long they had been with the company unless it is on a mutual or voluntary separation scheme and then to re-engage them on a contract basis or to terminate mainly local permanent workmen in favour of fix-termed contract foreign workmen.

[46] The finding of fact of the Industrial Court was that the company had not proved that the claimant had been rendered redundant and could not be re-assigned to any other projects or works. At para [38] the Industrial Court made the following finding of fact based on the evidence before it as follows:

> [38] The court is unable to find any evidence that the company has proved actual redundancy which necessitated the retrenchment of the claimant. Although the company claimed that 20% of the staff of the instrument department had no work to do, *the company has failed to adduce evidence to prove that the claimant's functions, duties and responsibilities had ceased to exist in the said department. His job functions remained but they had been taken by others*. (Emphasis added.)

[47] At para 40 of the award the Industrial Court observed that:

A ... The company also failed to prove that the claimant was redundant because there was no more work for him. COW1 agreed under cross-examination that the claimant's remaining work in SK316 Project was handed over to the claimant's assistant Randy a foreigner.

B **[48]** The Industrial Court found that the claimant's work had been programmed into the RAPID Project before he was asked to remain in the SK316 Project to solve a slippage problem. With respect to his existing work at the point of retrenchment at the Project SK316 there was still work to be done but instead a contract foreign worker Randy was directed to take over his work.

C

[49] The company would of course still remember that the claimant had earlier objected to his assignment to RAPID but the Industrial Court had accepted his explanation that his objection was not to the transfer but consider
D others to be better than himself and accept unquestioningly the to the reporting structure when he had to report to his subordinate. The claimant is not expected to be a saint where he should graciously lot assigned to him to report to his once subordinate. As stated that was already water under the bridge as not only did the transfer not materialise then but more importantly
E the claimant was required to continue supervising, trouble-shooting and solving the slippage problem in the SK316 Project.

[50] Such a finding of fact cannot be said to be so unreasonable that no reasonable person could have arrived at it. The High Court appeared to have
F formed a different view that it was unreasonable for the claimant to have unreasonably rejected the offer to be deployed to the RAPID Project where there was still work to be done. The fact remained that the claimant did not report to work at the RAPID Project because he was directed and instructed by the company to stay back at SK316 Project to solve the slippage problem.

G

[51] Precisely because the claimant was required to stay behind in SK316 Project that by the time it was due for his assignment to the RAPID Project, the company then decided that he be selected for retrenchment. Not that the
H claimant had expected to be rewarded for solving the slippage problem on SK316 Project but that he was not expecting to be terminated on ground of redundancy, having put in 13 years of service below his belt to the company and having achieved merit bonus for the past 3–4 years.

I **[52]** If indeed the factor hovering over the mind of the company was that he would not be reporting to work if he is to be assigned to the RAPID Project with that new organisation chart then surely this must be put to the test. In the event that he does not report to work that would be clear insubordination for which he can be terminated on ground of misconduct.

[53] After all as submitted by learned counsel for the company, the Federal Court in *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113; [2006] 3 CLJ 837 had propounded the principle as follows:

> [28] In Malaysia, the general rule governing the doctrine of superior orders is nothing more than the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders.

[54] The company cannot pre-empt that by terminating the claimant on ground of redundancy. The company cannot prejudge the previous action of the claimant in objecting to the reporting to his subordinate as governing his future action in that he would not be reporting for duty when the time comes for his posting there to the RAPID Project. Neither should the company resurrect the claimant's previous objection to reporting to his subordinate after some five months had passed as indicative of his present position to any transfer to the RAPID Project when that had been overtaken by the event of the company instructing him to remain back at the SK316 Project to solve a slippage problem. Be that as it may, the company admitted that the claimant's rejection of an alternative employment offer in the RAPID Project was an issue considered for his selection for retrenchment.

[55] It is not for the company to rationalise that at least in retrenchment he gets a sum for termination benefits for which he should be grateful but that in termination for misconduct he gets nothing and a bad reputation. The misconduct of refusing to report to work at the RAPID Project had not materialised because of a reassignment of the claimant to the SK316 event there was no show cause letter issued by the company to him for project which required his expertise to solve a slippage problem. In any not reporting to work at the RAPID Project simply because he was then not required to do so.

[56] Retrenchment is not a neater short cut to get rid of employees that a company does not want because of a perceived insubordination or poor performance. Neither can one prejudge how the claimant may respond to the assignment to the RAPID Project in that reporting structure where he has to report to his subordinate for he may choose to report to work though he has to stomach his pride and dignity or he may consider himself as being constructively dismissed.

[57] It is not for anyone to second-guess how the claimant would respond and we should not. All that should be asked based on the facts as presented at this first stage is whether the position and job of the claimant had been made redundant. The Industrial Court found as a matter of fact that there were still 11 foreign workers and five locals holding a similar position like the claimant at the material time of his termination. From the evidence and the evaluation of

A it by the Industrial Court the company had not discharged its burden to prove that the claimant had been rightly selected to be retrenched as compared to the 11 foreign workers and five locals holding a similar position and presumably skill sets and competencies as the claimant.

B **[58]** To justify the termination on ground of redundancy the comparison to be made is not so much to the staff that had been retrenched but to those being retained in preference to the claimant and to see if the company had justified that in showing the retrenchment of the claimant was reasonable in the circumstances of the case. The fact which the High Court highlighted at C paras (2)(vi) and (17)(ii) of the judgment that on the same month as when the claimant was retrenched, 16 other employees from the instrument department had also been retrenched is not relevant in determining whether the claimant had been rightly selected for retrenchment other than showing that the retrenchment in the company was pervasive and a gripping reality.

D

[59] Likewise when the High Court emphasized that overall 492 of the company's employees had been retrenched and that globally 6,000 employees of the Technip Group were retrenched at para 17(ii) of its judgment. What is relevant is whether the claimant ought to have been selected for retrenchment E having regard to the employees in the same instrument department that remained. It is not a case of since so many have been retrenched it is a matter of time before the axe would fall on the claimant and that when it does the claimant would have no right to complain because the many that received the same fate did not.

F

[60] Bearing in mind that the company bears the burden of proof, such a finding of fact by the Industrial Court is not perverse and neither can it be said to be totally unsupported by the evidence before the Industrial Court. Rarely would a review court want to disturb that finding unless there is absolutely no G evidence to support it altogether which is not the case here.

[61] In the court of appeal of *Bayer (M) Sdn Bhd v Ng Hong Pau* [1999] 4 MLJ 361, it was held as follows:

H > On redundancy, it cannot be gainsaid that the appellant must come to the court with concrete proof. *The burden is on the appellant to prove actual redundancy on which the dismissal was grounded* (see *Chapman & Ors v Goonvean & Rostowrack China Clay Co Ltd* [1973] 2 All ER 1063). It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient. There was I evidence before the court that although the sales were reduced, the workload of the respondent remained the same. After his dismissal, his workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant. (Emphasis added.)

[62] The High Court appeared to have placed the burden of proof on the claimant when at para [26] of its judgment the learned judge commented that the claimant 'has also failed to show that the said termination was based on other ground than the ground of redundancy as stated in the termination letter'. This was further reinforced at para [29] when the learned judge reiterated that additionally the claimant 'has not raised any issue that the termination has not complied with his contract of employment which ... is one of the pertinent issue (sic) in considering whether the termination is with just cause or excuse or unlawful'.

[63] As stated the burden of proof is always on the company to show before the Industrial Court that the termination on ground of retrenchment arising out of redundancy is for a just cause or excuse and that it is lawful and not actuated by irrelevant considerations like poor performance or perceived insubordination or that it was not done mala fide and did not reek of unfair labour practice. The Industrial Court found as a matter of fact that the company had failed to discharge its burden of proof.

[64] We accept as correct the following tests as laid down in *Lilly Industries (M) Sdn Bhd v Billy Wayne Selsor* [2006] 3 ILR 1507 at para 26 that the company must prove the following:

> Firstly, there must *be redundancy*. Secondly, the *dismissed workman must have been correctly selected for retrenchment* (objective criteria). And thirdly, the employer should have adopted a fair procedure before carrying out the retrenchment. These form the three pillars upon which an employer sets the stage from which he puts forth an arguable case to justify the dismissal of a workman for the reason of redundancy. There is one common beam that connects these three pillars. That is, *the unshakable proposition of law which imposes the burden upon the employer to prove the existence of these prerequisites* and thus establish the correctness of the dismissal. (Emphasis added.)

[65] The Industrial Court had taken into consideration the relevant factor of whether the claimant's position had been rendered redundant and had not taken into consideration the irrelevant factor of a previous objection raised by the claimant on his reporting to his subordinate.

WHETHER THE COMPANY HAD FOLLOWED THE LIFO PRINCIPLE OR HAD VALID REASONS TO DEPART FROM IT IN THE RETRENCHMENT

[66] The Industrial Court found as a matter of fact that the company had not followed the LIFO principle where the claimant is concerned. In fact, the company very deftly deflected the issue by not producing any evidence as to the

number of years of employment of the staff that still enjoyed employment with the company when the claimant was retrenched.

[67] As stated the company had not led any evidence to show that the 11 foreign workers and five local workers holding similar position like the claimant when the claimant was terminated had longer terms of service with the company.

[68] These are matters which are peculiarly within the knowledge and domain of the human resource department of the company and no evidence was forthcoming.

[69] The company was more keen to found its case on an exception to the LIFO principle which is that the ones retained have special skills and expertise not found in the claimant. Granted that is a valid exception if indeed it is true but no cogent evidence had been presented before the Industrial Court for it to believe the company other than a mere 'say so' which falls short of discharging the burden of proof.

[70] The Industrial Court had not been persuaded by the evidence of COW1 that the instrument design discipline is a rare specialty where the universities in Malaysia do not have a specialisation. In this day and age of continuous learning it is difficult to appreciate how an employee who is technically competent cannot pick up new skills as a senior instrument designer and in fact the claimant's last position with the company was that of a senior instrument designer.

[71] Indeed the claimant was himself an expert in his field of specialisation as an instrument designer. It is only fair that a worker who had spent more than ten years in that particular field of instrument design can be considered an expert in that particular field and if the foreign workers retained have special skills not possessed by the claimant then the company must lead evidence on that.

WHETHER THE COMPANY HAD PREFERRED TO RETAIN FOREIGN WORKMEN IN PREFERENCE TO LOCAL WORKMEN IN THE RETRENCHMENT

[72] It is a principle of retrenchment as contained in the code of conduct that if the exercise is necessary then the company must retrench the staff starting with those who are foreign workers. That is understandable for priority must be given to local workers because they are citizens who deserve the state's largesse and their welfare must be the first concern of the State whereas the foreign workers are here for pure economic reasons and if there is no work then they

can always return to their homeland where in some cases they could go on social security support or have some land where they could plant crops to sustain themselves though that may not be on a grand scale. A state has no obligation to ensure that a foreigner has a job to work on.

[73] No one would begrudge a state having as its industrial relation policy that if there should be a need to retrench staff because of an economic downturn then the exercise would start from the foreign labour for they are here on a work permit and the recognised exception of where they have special skills would apply in for example a locally incorporated subsidiary of a foreign multinational whose head from headquarters overseas would be retained as perhaps might be the head of various departments.

[74] The Industrial Court had found as a matter of fact that what had happened on the ground was that some staff whose services were terminated on ground of retrenchment were later re-engaged on a fixed-term contract. The Industrial Court found as a matter of fact that the company continued recruiting staff and extending the contract of foreigners. Further, it was revealed that the company had used a manpower agency to re-recruit staff who were ostensibly retrenched at the material time when the claimant was dismissed.

[75] Granted there may be workers that had opted for a mutual separation scheme because a contract term suits them well and perhaps for the same job a contract worker would be remunerated with better pay.

[76] However unless a staff had opted for such a mutual or voluntary separation scheme, those that are permanent staff have a legitimate expectation barring misconduct to continue in employment until their position is redundant or that they have reached retirement age. They bring long term stability to the company where growth with the company is concerned not to mention they being a repository of all the major milestones in the company.

[77] Whilst there is nothing stopping a company from employing foreign workers when local ones are available, it is a fact that where work permit is concerned the state as a matter of policy would allow only foreign workers with low skills in the 3-D jobs that are dirty, dangerous and difficult in certain sectors of the economy.

[78] Where these foreign workers are more of an expatriate they must then be shown to possess some special skills and expertise which the locals would not have or that there are not enough locals with such skills sets for their work permits to be approved.

[79] To retain foreign workers and to terminate local ones and then re-employ them through an agency does not engender confidence that the retrenchment exercise had been done bona fide. The Industrial Court could not be faulted in finding that in the retrenchment exercise the company had targeted locals for retrenchment whilst the foreign workers still get to keep their jobs.

[80] At para [39] of the award the Industrial Court made a finding that 'the company had opted to hire foreigners and contract staff rather than retaining its permanent employees'.

[81] While the foreign workers can return to their head office or to their home country where they may have some social security safety net, the locals are less mobile and would generally have nowhere to go without having to uproot themselves and with little social security safety net. On top of that bringing their case to the Industrial Court involves risks and is a long process as an award of the Industrial Court is still opened to challenge in the High Court and then to the court of appeal and if leave is granted, then until the Federal Court and along the way legal fees and costs would have to be paid for legal representation.

[82] We find no cogent reason to disturb the finding of fact of the Industrial Court that the local workers like the claimant had been selected for retrenchment in preference to the foreign workers and there is no evidence that those foreign workers in the same team have skills not possessed by the claimant as a senior designer.

WHETHER THE COMPANY HAD PREFERRED TO RETAIN CONTRACT WORKMEN IN PREFERENCE TO PERMANENT WORKMEN IN THE RETRENCHMENT

[83] It is the company's prerogative to decide whether it is more economical to have contract staff where upon the expiry of the fix-term contract there is no expectation of renewal. However where it had started with some staff that are permanent employees, for the company to switch to contract staff it has to lay-off the permanent staff on account of redundancy if that be the case or if the company is of the view that it is easier to manage the future with contract staff then it must phase out the permanent staff in a proper manner either by offering a mutual or voluntary scheme that is rewarding enough or that the work of the permanent staff has become redundant.

[84] The company cannot go on an exercise in reducing the headcount of the permanent employees just because head office has set a deadline to reduce the staff force in an overseas branch by a certain number within a certain period.

COW3, the senior human resource manager of the company admitted that the head office in Paris was involved in the retrenchment exercise by giving targets and directive. There must be a genuine case of redundancy and then following the accepted and approved practice of LIFO and also taking into consideration that foreign workers would have to go first and also contract staff as opposed to permanent staff; all other things being equal where segmentation of works and projects are concerned as well as specialised skills of the retained workers.

[85] Here the company had not led evidence to show that the contract staff retained in preference to the permanent staff have special skills not possessed by the claimant. In fact, the permanent staff that were terminated were in some cases re-employed back on a contract basis. While there is nothing wrong with that where both staff and company agree to it, where like here it is being challenged then the company would need to justify its retrenchment exercise on ground of redundancy.

[86] On the evidence before the Industrial Court the chairman had held as follows:

> [41] The Company was also not justified in reducing the head count of the permanent staff in favour of contract and foreign staff. COW1 testified that out of the 20 staff in the senior designer department, 4 foreigners and one local were released by the Company and those remaining were 11 foreigners and five local employees. There is no doubt that the Company's unfair selection and for the other reasons stated above, would be tantamount to unfair labour practice.

[87] Based on the evidence before the Industrial Court we cannot say that the chairman had no basis to come to the conclusion that she did as the burden is on the company to show that the foreign workers had some special skills not possessed by the claimant and that as for the local employees, they had been there longer than the claimant and even if they had not, they had some special skills not possessed by the claimant.

WHETHER THE COMPANY'S RETRENCHMENT EXERCISE WHERE THE CLAIMANT WAS SELECTED FOR RETRENCHMENT WAS DONE IN BAD FAITH

[88] The claimant submitted that the code of conduct for Industrial Harmony 1975 ('the code of conduct') had not been complied with the result that not only LIFO was not followed but that foreign workers and contract workers were retained at the expense of the claimant who had served longer than the foreign and contract workers retained.

[89] The company had argued that the code of conduct does not have the force of law and non-compliance with it cannot be fatal. The case of *Senjuang*

Sdn Bhd v Munsiah Mad Nor [2015] 1 ILR 471 was cited for the proposition that the code of conduct does not have any legal sanction. The chairman in that case relied on the case of *Penang & S Prai Textile & Garment Industry Employees' Union v Dragon & Phoenix Bhd Penang & Anor* [1989] 1 MLJ 481; [1989] 2 CLJ Rep 239 which stated this of the code of conduct:

> [32] ... its acceptance is voluntary. This is so expressed by the Minister in his foreword to the Code. There is no legal force or sanction for failing to accept such code of conduct ...

[90] Further, the Court of Appeal in *Equant Integration Services Sdn Bhd (in liquidation) v Wong Wai Hung & Anor* [2012] MLJU 582; [2012] 1 LNS 1296 held that:

> [12] ... the failure to comply with the Code per se cannot be fatal in a proper retrenchment exercise. This is because the Code does not have the force of law.

[91] While the code of conduct may not have the force of law, it is still the gold standard by which a company's action may be measured against to see if the whole exercise of retrenchment had been carried out bona fide and that every attempt had been made to explore alternatives before the termination on account of retrenchment.

[92] While the code of conduct is not statute law it nevertheless has some legal sanction as a document that the Industrial Court should have regard to when making its award as clearly spelt out on s 30(5A) of the IRA as follows:

> (5A) In making its award, the Court may take into consideration any agreement or code relating to employment practices between organizations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.

[93] The code of conduct was an agreement reached in February 1975 between the then Ministry of Labour and Manpower (now called the Ministry of Human Resource), the Malaysian Council of Employers' Organisation (now known as the Malaysian Employers Federation) and the Malaysian Trades Union Congress ('MTUC'). Its aim is to lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony.

[94] The High Court had directed its mind to the fact that the Industrial Court had acted unreasonably in considering the fact that the company was 'still financially sound' in concluding that the claimant was retrenched without just cause and excuse. The context in which the finding was made against the backdrop of unfair labour practice needs to be appreciated and so the said para [35] of the award is set out below:

> Nevertheless, from the figures submitted it is explicit that the Company was still financially sound though work was getting less and profits were declining. It is also evident from the documentary evidence produced that at all material times, there was work and bonus was paid out to staff in 2015 and 2016. In addition, the financial reports also show tang the Company Directors' remuneration was increased from the year 2015 to 2016.

[95] By no means did the Industrial Court conclude that the retrenchment was made in bad faith merely because though profits were declining the company was 'financially sound'. However, the Industrial Court was entitled to look at the fact of bonus paid and salary increases of the directors as part of its consideration as to whether the company had explored all mitigation measures to come to the conclusion that it did that it had reached the point where 'our volumes can no longer support the current operating cost'.

[96] Clearly staff bonuses and directors' remuneration would be part of the costs-cutting measures when there is a 'trough in the market cycle' in line with what is enjoined in the code of conduct in para 22(a)(v) 'Spreading termination of employment over a longer period'.

[97] It goes without saying that when head office's instruction is received by its local entity there is the urgent need to achieve the reduced headcount by the appointed time given irrespective of how it is being done. From the point of industrial jurisprudence in this country, every termination including on ground of retrenchment must be justified by the company for otherwise it becomes a dismissal without just cause and excuse such that the burden is on the company at the Industrial Court to justify the termination.

[98] While not a word was mentioned on the perceived incompetency and poor performance of the claimant in the letter of termination, yet what had percolated to the surface in the crucible of cross-examination of COW1 and COW2 was that the selection for retrenchment of the claimant was based on performance or rather his poor performance.

[99] The Industrial Court in its finding of fact commented as follows at para 40 of its award:

> The court is unable to agree that the company had exercised its power in bona fide when it set one of the principle in the selection of staff to be retrenched on the ground of performance-based. The company had retrenched the claimant after taking into consideration his work performance. If there were issues with the claimant's performance, the company could resort to other means to improve his performance and not terminating his employment under the guise of redundancy ...

[100] There was no evidence led that the claimant had been served with a warning letter to improve on his performance or that his previous performance appraisal had revealed something alarming about his poor performance. In fact, for the past 3–5 years he had been receiving his merit bonus and here we are talking of an employee who had been with the company for 13 years.

[101] If indeed his poor performance was the type that could be improved through training then the relevant training should be provided to the claimant. If it is not the type that could not be remedied then the claimant should be given a warning letter and if no further improvement then a show-cause letter so that he may have an opportunity to reply to the allegations of poor performance. See the case of *American Malaysian Life Assurance Sdn Bhd v Sivanasan Kanagasabai* [1997] 3 ILR 242.

[102] It would be unfair to select an employee for retrenchment based on a perceived poor performance when he had not been given an opportunity to be heard on his poor performance and more so when he had achieved his merit bonus for the past 3–5 years and successfully solved the slippage problem at the SK316 Project for a handing over to Petronas.

[103] Based on the test laid down in *Petroliam National Bhd v Nik Ramli Nik Hassan* we must ask whether the Industrial Court had acted on no evidence or had come to a conclusion which on the evidence it could not reasonably have come to. Having regard to the evidence before it the Industrial Court could not be said to have come to a decision that is so manifestly unreasonable that no reasonable tribunal, similarly circumstanced, would have arrived at which the Industrial Court had.

[104] A reviewing judge might be minded to come to a different conclusion from the established facts but he should exercise restraint. Any review of the facts as found by the Industrial Court has to be a low intensity review which findings are not to be disturbed unless it could be shown to be based on grounds of illegality or plain irrationality.

[105] Thus in *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1 at pp 3–4; [1997] 3 CLJ 235 at p 241 the Court of Appeal in affirming the decision of the High Court, refused to entertain in a judicial review what is effectively an appeal against findings of fact and in doing so observed as follows in the context of a retrenchment exercise:

> The question at the end of the day is whether a reasonable tribunal similarly circumstanced would have come to a like decision on the facts before it. *However widely understood the proposition in Rama Chandran and Amanah Butler may be, it does not include the review, in certiorari proceedings, of findings of fact based on the credibility of witnesses.*

> We are therefore in agreement with learned judge's refusal to enter upon a domain expressly reserved by law to the Industrial Court. The issue before that court was whether there was a genuine retrenchment exercise vis a vis the respondent. Retrenchment means: 'the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action' (per SK Das J in *Hariprasad v Divelkar* AIR [1957] SC 121 at p 132).
>
> *Whether the retrenchment exercise in a particular case is bona fide or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case.* It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised bona fide, the decision is immune from examination even by the industrial court. However, the Industrial Court is empowered, and indeed duty-bound, to investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact bona fide.
>
> Having carefully read the award of the Industrial Court, I am satisfied that that tribunal did not traverse beyond the ambit prescribed by written law or by the principles established by the decisions of our superior courts specifying its role in this area of human activity. I am satisfied that *the Industrial Court asked itself the right question, that it took into account relevant facts and that it excluded from its purview all irrelevant considerations.* In other words, it did not commit any 'Anisminic error' in the sense in which I used that phrase in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748. On the contrary, I find the decision of the Industrial Court to be in accordance with law and meritorious. (Emphasis added.)

[106] We find no illegality in the finding of the Industrial Court nor can the award be said to be irrational in all the circumstances if the case. We find that there had been a proper appreciation of the facts and the law by the Industrial Court and this is certainly not a case where the decision of the Industrial Court can be said to be devoid of or in defiance of logic and accepted moral standard that would justify the intervention of a review court.

PRONOUNCEMENT

[107] We see no cogent reason to set aside the findings of fact of the Industrial Court in arriving at its conclusion that the company had not discharged the burden of proving that the claimant had been terminated for a just cause and excuse on account of a valid redundancy.

[108] The Industrial Court had found that the company had not shown that it was justified not to follow the LIFO principle or that there were special skills in the foreign and contract workers in preference to the claimant such that the claimant had to be selected for retrenchment. The truth that emerged from the evidence of the company was that the axe had fallen on the claimant on account

of his poor performance and insubordination in complaining of his having to report to his subordinate in the RAPID Project.

[109] The retrenchment exercise was thus colourable and for a collateral purpose and the Industrial Court proceeded properly to make the award that it did in holding that the termination was without just cause and excuse and in awarding the compensation based on the number of years of service and the relevant back wages after taking into consideration the retrenchment benefits paid.

[110] The Industrial Court had made the following compensation to the claimant at para 47 of the award as follows:

Backwages of 24 months		
RM19,400 X 24 months	=	RM465,600
Deduction of 30% for post dismissal earnings	=	RM139,680
	Total	RM 325,920

Compensation in lieu of reinstatement of one month's pay for each year of completed service:

RM19,400 X 13 months salary (1 July 2002 to 29 September 2015)	=	RM252,200
Deduction of retrenchment benefits which has been paid to the claimant	=	RM174,600
	Total	RM403,520

[111] We had thus allowed the claimant's appeal and set aside the decision of the High Court. We affirmed the award of the Industrial Court and ordered costs of RM10,000 to the claimant as appellant subject to allocatur.

Appeal allowed, decision of High Court set aside and award of Industrial Court affirmed.

Reported by Nabilah Syahida Abdullah Salleh